

VIJAYALAKSHMI DEVI NADCHATIRAM

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v.

MAHADEVI NADCHATIRAM & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

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FAIZA TAMBY CHIK J

[ORIGINATING SUMMONS NO: R3-17-7-1997]

27 FEBRUARY 2001

ADMINISTRATIVE LAW: Remedies - Declaration - Application to stop counsel from representing another - Preliminary objection - Whether plaintiff ought to have filed application in several pending actions instead of filing one composite application

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LEGAL PROFESSION: Practice of law - Practice and etiquette - Complaints against advocates and solicitors - Proper procedure - Legal Profession Act 1976, s. 99 - Whether plaintiff's application in breach of s. 99

d

LEGAL PROFESSION: Practice of law - Practice and etiquette - Complaints against advocates and solicitors - Constitution of investigating tribunal - Legal Profession Act 1976, s. 100 - Whether plaintiff's application in breach of s. 100

e

CONSTITUTIONAL LAW: Courts - Forum for trial - Courts of Judicature Act 1964, s. 23 - Whether court has jurisdiction to hear matter

CONSTITUTIONAL LAW: Fundamental liberties - Right to counsel - Application to remove counsel from representing party - Whether a breach of rules of natural justice and doctrine of audi alterem partem

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The plaintiff applied to this court for a declaration for the following. Firstly, that the first defendant be estopped from representing the second defendant in Civil Suit No. 22-61-93 which was before the Seremban High Court. Secondly, that the first defendant and her legal firm have breached the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules' hereafter) and has never acted legally for the second defendant. And thirdly, that the first defendant and her legal assistants be restrained from acting as advocate and solicitor for any of her brothers and sisters in any capacity pertaining to the estate of their father and Nadchatiram Realities (1960) where the plaintiff is a party.

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The first defendant raised a preliminary objection, contending that the plaintiff ought to file applications in the several pending actions in which the former was acting for the second defendant instead of filing one composition.

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a Held:

- [1]** The plaintiff had breached s. 99 of the Legal Profession Act 1976 ('LPA' hereafter) which concerns the procedure for complaints against advocates and solicitors. Further, there was no investigating tribunal constituted as required by s. 100 of the LPA. (p 189 e-f)
- b**
- [2]** The plaintiff was in flagrant breach of s. 23 of the Courts of Judicature Act 1964 by commencing this action before this court. The first defendant resides in Subang Jaya. The second defendant and the estate of Nadchatiram and its assests are situated within Seremban. Therefore, the proper forum to hear the suit would be the Seremban High Court. (pp 189 f & 190 a)
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- [3]** By virtue of s. 94(3)(n) and (o) of the LPA and r. 28(a) of the Rules, the plaintiff should not have used the services of M/s Satha & Co in forwarding this application as the Satharuban was the co-defendant with the plaintiff in another case before the High Court in Kuala Lumpur. The plaintiff had suppressed this fact before this court and lodged a complaint against the first defendant. This was contrary to the equitable maxim that he who seeks equity must come with clean hands. (pp 190 b&g)
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- e**
- [4]** The plaintiff had failed to specify in the application the section relied upon in the LPA. It is a fundamental principle that a party must not take his opponent or the court by surprise. Based on the said failure, the application should be struck off. (p 191 c-d)
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- [5]** The plaintiff's application to remove the first defendant from representing the second defendant tantamount to a deprivation of the latter's constitutional rights of being defended by a solicitor of his own choice. This was a serious breach of the rules of natural justice and the doctrine of *audi alterem partem*. (p 192 b-c)
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- [6]** The plaintiff's application to restrain the first defendant from representing the second defendant was in effect an injunction. It was observed that the plaintiff had acquiesced to the first defendant acting for the second defendant and would therefore be inequitable to request for the injunction. (p 192 c-d)
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- [7]** The Rules only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of the legal proceedings in the High Court. The Bar Council has no power under the Legal Profession Act to make rules to regulate the procedure of legal proceedings. (p 192 i)
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[8] The plaintiff was asking the court to assist in an unconscionable conduct. She and her husband have filed unnecessary applications to prevent the first defendant from running her institutions. The court opined that the plaintiff was a vexatious litigant who had conspired with her husband, ie, her counsel in this case, who was suing the first defendant for libel. (p 193 d-e)

[Defendant's preliminary objection allowed with costs. Plaintiff's amended originating summons dismissed with costs.]

Case(s) referred to:

Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors [1988] 1 MLJ 33 (*refd*)
Black v. Taylor [1993] 3 NZLR 403 (*refd*)
Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing [1997] 3 CLJ 754 (*refd*)
MRK Nayar v. Ponnusamy & Ors [1982] 2 MLJ 174 (*refd*)
Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor [1994] 2 CLJ 249 (*refd*)
Vijayalakshmi Devi Nadchatiram v. Saraswathy Nadchatiram [1996] 4 CLJ 430 (*refd*)
Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram (beramal undang-undangnya di bawah nama dan gaya T/n N Saraswathy Devi) [2000] 4 CLJ 870 (*refd*)

Legislation referred to:

Courts of Judicature Act 1964, s. 23
Legal Profession Act 1976, ss. 28, 99, 94(3)(n), (o), 100, 103E
Legal Profession (Practice and Etiquette) Rules 1978, r. 28(a)

Other source(s) referred to:

ICF Spry, *The Principles of Equitable Remedies*, p 239
For the applicant - Satharuban Sivasubramaniam (Malik Imtiaz); M/s Satha & Co
For the 1st defendant - M Mahadevi; M/s Mahadevi Nadchatiram & Partners
For the 2nd defendant - Jegadevan Nadchatiram; M/s J Nadchatiram

Reported by M Maheswaran

JUDGMENT

Faiza Tamby Chik J:

By a notice of preliminary objections, the first defendant contends that instead of filing one composite application, the plaintiff ought to file applications in the several pending actions in which the first defendant is acting for the second defendant.

The orders that the plaintiff is seeking from this court are:

- (i) Mahadevi Nadchatiram practising under Mahadevi Nadchatiram & Partners and her legal assistant be estopped from acting for the second defendant in Seremban High Court Civil Suit No. 22-61-93;

- a* (ii) Mahadevi Nadchatiram practising under Mahadevi Nadchatiram & Partners and her legal assistant be estopped from acting for the second defendant in the Court of Appeal Nos: N-02-477-96, N-02-478-96, N-02-479-96, N-02-480-96, N-02-481-96, N-02-482-96, N-02-483-96, N-02-484-96, N-02-485-96 and N-022-486-96;
- b* (iii) A declaration that Mahadevi Nadchatiram and her legal firm of Mahadevi Nadchatiram & Partners have breached/violated the Legal Profession (Practice and Etiquette) Rules 1978 and has never acted legally for the second defendant;
- c* (iv) A declaration that Mahadevi Nadchatiram practising under the name of Mahadevi Nadchatiram & Partners and her legal assistants be restrained from acting as advocate and solicitor for any of her brothers and sisters in any capacity pertaining to the estate of Nadchatiram Muttucumaru and Nadchatiram Realities (1960) Sdn Bhd whereby plaintiff is a party;
- d* (v) A declaration that Mahadevi Nadchatiram practising under the name of Mahadevi Nadchatiram & Partners and her legal assistants ought not to act for Shanti Thiruchelvasegaram in any proceedings, civil suits, appeals that Shanti Thiruchelvasegaram may bring against her parents;
- e* (vi) Costs.
- On 14 February 2001 the plaintiff withdrew prayers (2) and (5) with costs to the defendant. Accordingly prayers (2) and (5) were struck off with costs to the defendants.
- f* The plaintiff and the first and second defendant are blood relatives and are all advocates and solicitors. The estate of Nadchatiram Muttucumaru deceased is the father's estate of which the parties to the proceedings are the beneficiaries under the said will. The estate of Nadchatiram Muttucumaru was declared insolvent when probate was taken. The first defendant is not a party to the said proceedings. A number of cases are pending between the plaintiff and the second defendant. There are several cases pending between the plaintiff and the second defendant but the first defendant is only acting for the following:
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- h* (i) In the High Court of Seremban Civil Suit No. 22-61-93;
- (ii) The appeals in the Court of Appeal as stated above were fixed for hearing and disposed off on 10, 11 and 12 November 1997 and no preliminary objection was raised by the plaintiff in those ten appeals;
- i* (iii) The first defendant is not a party in these proceedings and is acting as an advocate and solicitor.

The first defendant commenced acting for the second defendant in the above suit in 1993. In the Court of Appeal on 10, 11 and 12 November 1997 the plaintiff did not object to the first defendant acting. The decision in respect of Civil Appeal No. N-02-251-96 was also delivered by the Court of Appeal in favour of Saraswathy Devi Nadchatiram reversing the decision of Justice Dato' Mohd Noor Hj Abdullah in Seremban High Court in *Vijayalakshmi Devi Nadchatiram v. Saraswathy Nadchatiram* [1996] 4 CLJ 430, but the Federal Court allowed the appeal and stated that the Court of Appeal had erred in law and restored the decision of the High Court Seremban dated 23 March 1996. The plaintiff raised no objections until 15 April 1997. It is noted that the plaintiff has caveated all assets of the second defendant. The first defendant for natural love and affection and without any legal fees volunteered to act for the second defendant.

The plaintiff contends that the first defendant ceases to act in the Seremban High Court Civil Case No. 22-61-93 and the ten appeals in the Court of Appeal. However, it is noted that the ten appeals in the Court of Appeal have already been disposed and no objections were raised by the plaintiff in the Court of Appeal. Nevertheless this prayer has been withdrawn by the plaintiff. I am of the view that what the plaintiff is asking for in the instant application is in effect for injunctive remedies based on objections on points of law.

Consequently for reasons which I am going to state hereunder, the plaintiff's application in the amended originating summons is hereby dismissed in limine. The plaintiff had breached s. 99 of the Legal Profession Act 1976 ('LPA') which provides the procedure for complaints against advocates and solicitors. Section 100 LPA provides for the constitution of an investigating tribunal. Exhibit "MD3" of the first affidavit of Mahadevi Nadchatiram affirmed on 23 September 1997 is a letter to the Bar Council. No investigating tribunal has been constituted under s. 100. Again s. 23 of the Courts of Judicature Act 1964 has not been complied with. Section 23 provides the jurisdiction of the High Court to try all civil proceedings where:

- (a) the cause of action arose, or
- (b) the defendant or one of several defendants resides or has his place of business, or
- (c) the facts on which the proceedings are based exist or are alleged to have occurred, or
- (d) any land the ownership of which is disposed is situated,

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- a* within the local jurisdiction of the court. This application should have been filed in the original suit which is Seremban High Court: 22-61-93 (See *Black v. Taylor* [1993] 3 NZLR 403 where, “an application to restrain a barrister from acting could be made by seeking a declaration or injunction against the barrister but could also properly be made by way of interlocutory application
- b* - see p. 405 line 45, p. 407 line 21, p. 419 line 24.”

It is observed that in respect of s. 94(3)(n) and (o) of the LPA and r. 28(a) of the Legal Profession (Practice and Etiquette) Rules 1978 the plaintiff should not have used M/s Satha & Co to file this application because Satharuban is the co-defendant with the plaintiff in Kuala Lumpur High Court: S2-22-562-93. See *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 AMR 2947 where the court held:

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- (c) However, although Rule 28(a) of the Legal Profession (Practice and Etiquette) Rules, 1978 (the 1978 Rules) lays emphasis on the words “a material and disputed question of fact” and does not bar an advocate and solicitor from accepting a brief subject to the circumstances mentioned therein, in this case, as GM knew that he was required as a witness by the defendant, it would be difficult for him to perform in court or in chambers for the plaintiff without breaching r. 28(a) of the 1978 Rules. (see p. 2962 line 18-27).
- d*
- (d) By virtue of Rule 28(a) of the Rules, GM should be barred from representing the plaintiff be it in open court or in chambers. The 1978 Rules must be complied with for an orderly conduct of litigation and to maintain and observe the standard of conduct required of members of this profession. GM cannot be a witness for the defendant and counsel for the plaintiff. The right of a particular individual to be represented by an advocate and solicitor of his own choice is not absolute, as the courts have an inherent power and authority to refuse to permit a particular advocate and solicitor from appearing on behalf of a particular individual in a particular case. (see p. 2973 line 42 - P 2974 line 32).
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- g* It is also noted that the court is made aware that the plaintiffs husband has acted as counsel. The plaintiff has suppressed this fact to the court and lodged a complaint against the first defendant (see *MRK Nayar v. Ponnusamy & Ors* [1982] 2 MLJ 174). In the instant case the plaintiff has offended the clean hands principle. He who seeks equity must do equity. See *The Principles of Equitable Remedies* by ICF Spry at p. 239 where he stated:
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- The maxims that a plaintiff in equity must approach the court with clean hands and that he who seeks equity must do equity are often used in a purely rhetorical manner in cases where the refusal of relief may better be justified on more precise grounds It may be said of these cases that they fall into two main categories. In the first category, the plaintiff is shown to have materially misled the court or to have abused its process, or at least to have
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attempted to do so. In the second category are certain cases where the grant of the relief that the plaintiff seeks would enable him to achieve a dishonest purpose and where in all the circumstances it appears to the court to be inequitable to grant the particular relief in question. These cases may indeed be said to depend ultimately on a general principle that is directed against unconscionable conduct or the absence of clean hands. But whilst this general principle is susceptible of fresh applications in appropriate circumstances, care should be taken not to extend it to cases where, inferentially, it has already been held not to apply.

The recent Federal Court's decision of *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram (beramal undang-undangnya di bawah nama dan gaya T/n N Saraswathy Devi)* [2000] 4 CLJ 870 does not affect the first defendant in the instant case because the first defendant here has no pecuniary interest and all her cases have been disposed off by the Federal Court.

In the instant case it is observed that the plaintiff has failed to specify in the amended originating summons any particular section of the LPA in court's entitlement and this is wrong and embarrassing. This is based on the fundamental principle that a party must not take either his opponent or the court by surprise and as the originating process fails to state with sufficient particularity the section of the statute under which the court is being moved this amended originating summons should be struck off. As stated earlier s. 99 of the LPA provides procedure of complaint against an advocate and solicitor. Section 103E provides that an appeal to be made to the High Court and the appeal is to be heard by three judges. As such under the LPA the High Court has no original jurisdiction to hear the plaintiff's application. The plaintiff has moved the court under the LPA by raising in the entitlement that they would rely on the provisions of LPA which the plaintiff felt were relevant for her purpose. The plaintiff is bound by her own cause of action and must confine herself to the Act and therefore she must find her remedies within the strict walls of the Act.

Moreover in the instant case, as stated earlier the plaintiff is in flagrant breach of s. 23 of the Courts of Judicature Act and is forum hunting which is not recognised by law. The first defendant is residing in Subang Jaya and the second defendant in Seremban and the estate of Nadchatiram and its assets are situated within Seremban. The correct court, no doubt, as this court has no jurisdiction is the Seremban High Court in the original action *vide* High Court Seremban Civil Suit No. 22-61-93. There were four applications for injunction against Mahadevi Nadchatiram & Partners and Mahadevi Nadchatiram and servants and agents in the Court of Appeal and the Court of Appeal rejected and dismissed the said prayers. Therefore under the doctrine of *stare decisis* this court is bound by the above decision and accordingly dismiss the plaintiff's application. One of the applications for an injunction

- a* are annexed and marked as exh. “MD6” of the affidavit Mahadevi Nadchatiram affirmed on 14 November 1997. By requesting for a declaration the plaintiff is masquerading the injunction and this I think should not be allowed.

- b* It is observed that the first defendant has consented to withdraw from acting for Shanti Thiruchelvasegaram before this application. See exh. “MD1” of the affidavit of Mahadevi Nadchatiram affirmed on 23 September 1997. In this instant case the plaintiff has not been truthful to the court. The plaintiff is further requesting for the removal of the first defendant and thereby depriving the second defendant of his constitutional rights of being defended by a solicitor of his own choice. This is a serious breach of the rules of natural justice and the Rules described as *audi alteram partem*, ie, no judicial order can be made affecting the rights of persons unless a reasonable opportunity has been given to him to show why it should not be made. The prayers sought for in the amended originating summons is to restrain the first defendant from acting as advocate and solicitor for the second defendant. Such an order is
- d* an injunction. An injunction is an order of the court to the party addressed to refrain from doing a particular act. It is observed that the plaintiff has acquiesced to the first defendant acting for the second defendant and it is inequitable to request for injunction.

- e* Another matter is that the plaintiff failed to explain the delay. See *Noor Jahan Abdul Wahab v. Md Yusoff Amanshah & Anor* [1994] 2 CLJ 249 at p. 257 where Edgar Joseph Jr SCJ stated:

- f* It is settled law that delay on the part of the Plaintiff in seeking an interlocutory injunction ‘may be calculated to throw considerable doubt upon the reality of his alleged injury’ (per Lord Chelmsford LC in *Ware v. Regent’s Canal Co* at p. 1257) and hence may be of importance when the balance of convenience is being determined. But much will depend upon the particular circumstances of each case. In other words, the delay is often explicable by reference to other circumstances; for example, a plaintiff might have delayed the institution of proceedings because he wished to obtain better means of proving his case (see *Coles v. Sims* at p. 771). It follows, therefore, that delay on the part of a
- g* plaintiff, although it may give rise to an inference that he has not suffered hardship or prejudice, such inference is easily open to rebuttal by direct evidence of the particular circumstances.

- h* Alternatively I think the remedy is available under s. 99 of the LPA. It can be seen here that no investigation tribunal has been appointed by the Bar Council pursuant to s. 100 of the LPA.

- i* As regards prayer 3 of the amended originating summons, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of the legal proceedings in the High Court. The Bar Council has no power under the Legal Profession Act to make rules to regulate the

procedure of legal proceedings. (See *Asia Commercial Finance (M) Berhad v. Bank Bumiputra Malaysia Berhad & Ors* [1988] 1 MLJ 33). a

It is observed that the exh. "MD1" of the first defendant's first affidavit dated 23 September 1997 shows that the first defendant has consented to withdraw in Civil Suit No. S2-22-562-93. Exhibit "MD5" shows that the plaintiff is suing Datin Danapakia Devi who is her sister *vide* Seremban High Court Civil Suit No. 22-28-95 and the solicitors who are on record for the plaintiff are M/s Satha & Co. Then *vide* Seremban High Court Companies Winding-up Petition No. 28-2-88 M/s Satha & Co have prepared an affidavit for Datin Danapakia Devi against the Pegawai Penerima & Liquidator for Nadchatiram Realities (1960) Sdn Bhd (in liquidation). Exhibit "MD1" also shows that Satharuban of M/s Satha & Co is the co-defendant with Vijayalakshmi Devi who is the plaintiff in this case and therefore in breach of s. 28 LPA. (See *Syarikat Pengangkutan Sakti Sdn Bhd v. Tan Joo Khing t/a Bengkel Sen Tak* [1997] 3 CLJ 754) M/s Satha & Co is again acting for the plaintiff in this suit. Exhibit "MD7" shows that the plaintiff's husband's firm, M/s M Segaram & Co acted in Seremban High Court Originating Summons No. 24-391-90 for obtaining leave to sue the first defendant and the court documents were all prepared by the plaintiff's husband. The plaintiff's husband has breached the clean hands principle. He who seeks equity must do equity. The plaintiff is asking the court to assist an unconscionable conduct. No court of equity will aid a man to derive an advantage from his own wrong. Exhibit "MD8" shows that the plaintiff and her husband have filed unnecessary applications to prevent the first defendant from running her institutions. I think the plaintiff is a vexatious litigant and has conspired with her husband who is suing the first defendant for RM40 million for libel and is jealous of her helping the second defendant for natural love and affection and giving all her wealth to the two foundations. The plaintiff by filing these claims is trying to make the law an ass. In all of the first defendant's cases against the plaintiff, the plaintiff has lost and the Federal Court has awarded the first defendant RM4.9 million, 70 shares in Nadchatiram Realities and 153 acres against the plaintiff which the first defendant I am made to aware is now going to give all her fortune to the two foundations. b
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It is also observed that exh. "MD1" of the first defendant's affidavit dated 14 November 1997 shows that the deceased's estate is insolvent. The first defendant has no pecuniary interest. (see *Vijayalakshmi Devi Nadchatiram v. Saraswathy Devi Nadchatiram* [1996] 4 CLJ 430). The late Nadchatiram in his affidavit at exh. "MD2" confirms that there are no assets in the estate of the deceased and that they have all been sold to third parties. And exh. "MD3" confirms that the lands have all been sold to third parties. Exhibit "MD4" h

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- a* confirms that the lands have been sold to Indian labourers. Exhibit “MD5” further confirms why the first defendant withdrew because it goes to show that the first defendant is an honest person.

Exhibit “MD6” shows that the plaintiff requested for an injunction which was denied.

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- It can be seen that exh. “MD8” of the first defendant’s affidavit affirmed on 14 November 1996 clearly proves that the plaintiff is not truthful. The AR card was sent from Satha & Co to the first defendant’s firm but was returned to the plaintiff’s husband’s firm. This shows that the plaintiff has not been truthful and has not disclosed to the court the true facts. (See *MRK Nayar v. Ponnusamy & Ors* [1982] 2 MLJ 174). As to exh. “MD11” the plaintiff cannot approbate and reprobate. (See *Field’s Law Relating to Estoppel*.) The plaintiff’s husband filed on behalf of the plaintiff a writ against the second defendant *vide* Seremban High Court: 24-346-92. Exhibit “MD12” are the affidavits of
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- d* Datin Danapakia Devi which show that M/s Satha & Co have been filing affidavits without her knowledge and permission. In conclusion it is observed that documentary evidence in the instant case shows that the plaintiff has no case against both the defendants.

- For these reasons, the preliminary objection by the first defendant is allowed with costs and the amended originating summons in lampiran (41) by the plaintiff is dismissed with cost.
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